



CFTC Issues Last-Minute Deadline Extension for Derivatives End-Users with Respect to Dodd-Frank Swap Reporting Rules and No-Action Relief from Certain Inter-Affiliate Swap Reporting Requirements

April 12, 2013

The U.S. Commodity Futures Trading Commission (the “CFTC”) recently issued two no-action letters that provide last-minute relief for many derivative end-users with respect to new transaction reporting requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Most notably, the CFTC delayed the deadline for most non-swap dealer, non-major swap participant parties to report required information relating to most categories of transactions that constitute “swaps”¹ under the Dodd-Frank Act.² The deadline had previously been scheduled to occur on April 10, 2013 for such parties. The CFTC also provided relief from certain reporting requirements relating to Dodd-Frank swaps between affiliates.³

CFTC SWAP REPORTING RULES

Under the Dodd-Frank Act and CFTC regulations, the parties to any Dodd-Frank swap must report certain information about the transaction to a registered data warehouse known as a swap data repository (“SDR”) or to the CFTC (the “Swap Reporting Rules”).⁴ The Swap Reporting Rules impose reporting requirements for Dodd-Frank swaps entered into on or after the applicable compliance date and also for so-called “historical swaps” – Dodd-Frank swaps already in existence prior to the applicable compliance date and after the effective date of the Dodd-Frank Act (July 21, 2010). In general, one of the parties to each such swap must be designated as the “reporting counterparty,” and bears responsibility for reporting required

¹ As defined in 7 U.S.C. § 1a(47) and associated regulations and referred to herein as “Dodd-Frank swaps.”

² Time-Limited No-Action Relief for Swap Counterparties that are Not Swap Dealers or Major Swap Participants, from Certain Swap Data Reporting Requirements of Parts 43, 45 and 46 of the Commission’s Regulations, CFTC No-Action Letter No. 13-10 (April 9, 2013) (the “Reporting Deadline No-Action Letter”).

³ No-Action Relief for Swaps between Affiliated Counterparties that are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements under Parts 45, 46, and Regulation 50.50(b) of the Commission’s Regulations, CFTC No-Action Letter No. 13-09 (April 5, 2013) (the “Inter-Affiliate Swap No-Action Letter”).

⁴ See, e.g., 17 C.F.R. Parts 43, 45, and 46.

information about the transaction at the time of entry and on an ongoing basis over the life of the swap.⁵

REPORTING DEADLINE EXTENSION FOR CERTAIN REPORTING COUNTERPARTIES

Prior to the CFTC’s no-action relief, a reporting counterparty that is neither a swap dealer⁶ nor a major swap participant⁷ was generally required to comply with the Swap Reporting Rules with respect to new Dodd-Frank swaps and historical swaps on or after April 10, 2013.⁸ The Reporting Deadline No-Action Letter, however, extends the reporting deadline as summarized in the table below. In all cases, the no-action relief only applies where the reporting counterparty is not a swap dealer or major swap participant (a “non-SD/MSP”).

Dodd-Frank swaps where the reporting counterparty is a “financial entity,” ⁹ and is not a swap dealer or major swap participant ¹⁰	
Category of Dodd-Frank swap	Applicable new deadline under the no-action letter (all times Eastern)
Historical swaps (entered into prior to 12:01 a.m. on April 10, 2013)	Sept. 30, 2013 (12:01 a.m.)
Swaps entered into after 12:01 a.m. on April 10, 2013	
<ul style="list-style-type: none"> Interest rate and credit swap classes 	No extension (April 10, 2013)
<ul style="list-style-type: none"> Equity, foreign exchange, and other commodity swap classes 	May 29, 2013 (12:01 a.m.) <u>provided</u> that the reporting counterparty must backload and report to an SDR by June 29, 2013 (12:01 a.m.) all swap transaction data for the period from April 10, 2013 to May 29, 2013 that the reporting counterparty would have

⁵ In many cases, a prescribed hierarchy under the Swap Reporting Rules automatically determines the reporting counterparty, based on factors such as whether one or both of the parties is a swap dealer. *See, e.g.*, 17 C.F.R. §§ 45.8, 46.5.

⁶ As defined in 7 U.S.C. § 1a(49) and 17 C.F.R. § 1.3.

⁷ As defined in 7 U.S.C. § 1a(33) and 17 C.F.R. § 1.3.

⁸ *See* Reporting Deadline No-Action Letter, at 2-3.

⁹ The term “financial entity” generally includes (subject to certain exclusions) any person who is (1) a swap dealer; (2) a security-based swap dealer; (3) a major swap participant; (4) a major security-based swap participant; (5) a commodity pool; (6) a private fund, as defined in Sec. 202(a) of the Investment Advisers Act of 1940; (7) an employee benefit plan, as defined in paragraphs 3 and 32 of Sec. 3 of the Employee Retirement Income Security Act of 1974; or (8) a person predominantly engaged in activities that are in the business of banking or in activities that are financial in nature, as defined in Sec. 4(k) of the Bank Holding Company Act of 1956. 7 U.S.C. § 2(h)(7)(C); *see also* Reporting Deadline No-Action Letter, at 4, n. 16.

¹⁰ Reporting Deadline No-Action Letter, at 5.

	been required to report pursuant to Part 45 of the Swap Reporting Rules ¹¹ in the absence of the no-action relief.
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Dodd-Frank swaps where the reporting counterparty is <u>not</u> a “financial entity” ¹²	
Category of Dodd-Frank swap	Applicable new deadline under the no-action letter (all times Eastern)
Historical swaps (entered into prior to 12:01 a.m. on April 10, 2013)	Oct. 31, 2013 (12:01 a.m.)
Swaps entered into after 12:01 a.m. on April 10, 2013	
<ul style="list-style-type: none"> Interest rate and credit swap classes 	July 1, 2013 (12:01 a.m.) <u>provided</u> that the reporting counterparty must backload and report to an SDR by Aug. 1, 2013 (12:01 a.m.) all swap transaction data for the period from April 10, 2013 to July 1, 2013 that the reporting counterparty would have been required to report pursuant to Part 45 of the Swap Reporting Rules in the absence of the no-action relief.
<ul style="list-style-type: none"> Equity, foreign exchange, and other commodity swap classes 	Aug. 19, 2013 (12:01 a.m.) <u>provided</u> that the reporting counterparty must backload and report to an SDR by Sept. 19, 2013 (12:01 a.m.) all swap transaction data for the period from April 10, 2013 to Aug. 19, 2013 that the reporting counterparty would have been required to report pursuant to Part 45 of the Swap Reporting Rules in the absence of the no-action relief.

The CFTC notes that the Reporting Deadline No-Action Letter’s extensions of the reporting deadlines in no way affect the compliance dates for parties’ swap recordkeeping obligations, for which a compliance date of April 10, 2013 (at 12:01 a.m.) remains in effect for non-SD/MSP parties.¹³ Such recordkeeping obligations also include a requirement for each party covered by

¹¹ 17 C.F.R. Part 45.

¹² Reporting Deadline No-Action Letter, at 6.

¹³ *Id.* at 7.

the recordkeeping rules to obtain to obtain a Legal Entity Identifier, currently known as a CFTC Interim Compliant Identifier or “CICI.”¹⁴

REPORTING RELIEF WITH RESPECT TO CERTAIN INTER-AFFILIATE SWAPS

The CFTC also issued last-minute relief for persons who are not swap dealers or major swap participants (or affiliates of such entities) from certain reporting requirements in respect of Dodd-Frank swaps between affiliates. The relief is subject to certain conditions, as discussed further below, with different requirements applying for new swaps entered into on or after April 10, 2013 and for historical swaps.

Reporting Obligations with Respect to New Swaps

As described in more detail below, the Inter-Affiliate Swap No-Action Letter exempts from most reporting requirements qualifying new Dodd-Frank swaps between affiliates where one party holds a 100% ownership interest in the other party, or where a common third party holds a 100% ownership interest in both parties. The letter also provides more limited relief for qualifying new Dodd-Frank swaps between affiliates where one party holds a majority ownership interest in the other party, or where a common third party holds a majority ownership interest in both parties, by allowing the reporting party to report required information on a quarterly basis.

Exemption for Certain Swaps Based on 100% Ownership or Common 100% Ownership

The Inter-Affiliate Swap No-Action Letter exempts a reporting counterparty from most swap reporting requirements¹⁵ with respect to qualifying Dodd-Frank swaps pursuant to the conditions described below:

Criteria for Inter-Affiliate Swap Exemption from Reporting Requirements¹⁶

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| <p>(1) The swap is between affiliated counterparties where:</p> <ul style="list-style-type: none">(a) one affiliated counterparty, directly or indirectly, holds a 100% ownership interest in the other counterparty, and the affiliated counterparty that holds the 100% ownership interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles (“GAAP”) or International Financial Reporting Standards (“IFRS”), and such consolidated financial statements include the financial results of the 100%-owned counterparty; or(b) a third party, directly or indirectly, holds a 100% ownership interest in both |
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¹⁴ *Id.*

¹⁵ Specifically, the Inter-Affiliate Swap No-Action Letter provides relief with respect to the following provisions: 17 C.F.R. §§ 45.3(d)(1) (swap creation data – primary economic terms), 45.3(d)(3) (swap creation data – confirmation data), 45.4(c)(1)(ii) (swap continuation data – life cycle event data/state data), 45.4(c)(2)(ii) (swap continuation data – valuation data), 45.5 (unique swap identifier), and 50.50(b) (in connection with election of the end-user exception to clearing). See Inter-Affiliate Swap No-Action Letter, at 4.

¹⁶ Inter-Affiliate Swap No-Action Letter, at 4-6.

<p>affiliated counterparties, and the third party reports its financial statements on a consolidated basis under GAAP or IFRS, and such consolidated financial statements include the financial results of both of the affiliated counterparties.</p> <p>For purposes of this condition, an affiliated counterparty or third party directly or indirectly holds a 100% ownership interest if it directly or indirectly holds 100% of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, 100% of the capital of a partnership.</p>
(2) Neither party to the swap is (a) a swap dealer or major swap participant; (b) affiliated with a swap dealer or major swap participant; or (c) affiliated with a financial company that has been designated as systemically important by the Financial Stability Oversight Council pursuant to Section 113 of the Dodd-Frank Act (a “ <u>SIFI</u> ”)
(3) The swap was not executed on or pursuant to the rules of a designated contract market (“ <u>DCM</u> ”), a swap execution facility (“ <u>SEF</u> ”), a foreign board of trade that is either registered with the CFTC pursuant to Section 4(b) of the Commodity Exchange Act and Part 48 of the CFTC regulations or operating pursuant to CFTC no-action relief (an “ <u>FBOT</u> ”), a trading facility (as defined in 7 U.S.C. § 1a), or any other trading platform where the orders of the affiliated counterparties may be exposed to potential execution against unaffiliated counterparties.
(4) Neither party to the swap has submitted it to a derivatives clearing organization for clearing.
(5) The parties have not elected to exempt the swap from a clearing requirement pursuant to the “Inter-Affiliate Clearing Exemption,” ¹⁷ in which case applicable reporting requirements shall apply. ¹⁸
(6) All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR pursuant to, or as if pursuant to, Parts 43, 45, and 46 of the CFTC regulations. ¹⁹ (The CFTC notes that if the unaffiliated counterparty is the reporting party for any such swap, the affiliated counterparty may rely on the unaffiliated counterparty to report.)
(7) A reporting counterparty relying on this relief must maintain records of all swap data it would have been required to report if not for the no-action relief under the Inter-Affiliate Swap No-Action Letter. In addition, the reporting counterparty must maintain, as part of such records, internally generated swap identifiers for each swap subject to the relief. Promptly upon request from the CFTC, the reporting counterparty must make all such records available in reportable form for inspection and production.

¹⁷ See 17 C.F.R. § 50.52; see also Clearing Exemption for Swaps Between Certain Affiliated Entities (Apr. 1, 2013), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister040113.pdf>.

¹⁸ The CFTC notes that this condition does not necessarily preclude the parties from electing the end-user exception to a clearing requirement pursuant to 7 U.S.C. § 2(h)(7) (the “End-User Exception”) with respect to the Dodd-Frank swap, if eligible, and still qualifying for the no-action relief under the Inter-Affiliate No-Action Letter. See Inter-Affiliate No-Action Letter, at 2-3.

¹⁹ 17 C.F.R. Parts 43, 45, and 46.

Quarterly Reporting for Certain Swaps Based on Majority Ownership or Common Majority Ownership

The Inter-Affiliate Swap No-Action Letter provides that a reporting counterparty may comply with most swap reporting requirements²⁰ by reporting on a quarterly basis with respect to qualifying Dodd-Frank swaps pursuant to the conditions described below. If a swap qualifies for this relief, the reporting party may report the relevant information within 30 days following the end of each of its fiscal quarters, rather than according to the much shorter timing requirements that would otherwise apply.²¹ The requirement to report would commence at the end of the reporting party's first fiscal quarter ending on or after June 30, 2013.²²

Criteria for Quarterly Reporting of Inter-Affiliate Swap Data²³
<p>(1) The swap is between affiliated counterparties where:</p> <ul style="list-style-type: none"> (a) one affiliated counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty, and the affiliated counterparty that holds the majority ownership interest in the other counterparty reports its financial statements on a consolidated basis under GAAP or IFRS, and such consolidated financial statements include the financial results of the majority-owned counterparty; or (b) a third party, directly or indirectly, holds a majority ownership interest in both affiliated counterparties, and the third party reports its financial statements on a consolidated basis under GAAP or IFRS, and such consolidated financial statements include the financial results of both of the affiliated counterparties <p>For purposes of this condition, an affiliated counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.</p>
<p>(2) Neither party to the swap is (a) a swap dealer or major swap participant; (b) affiliated with a swap dealer or major swap participant; or (c) affiliated with a SIFI.</p>
<p>(3) The swap was not executed on or pursuant to the rules of a DCM, SEF, FBOT, trading facility (as defined in 7 U.S.C. § 1a), or any other trading platform where the orders of the affiliated counterparties may be exposed to potential execution against unaffiliated counterparties.</p>
<p>(4) Neither party to the swap has submitted it to a derivatives clearing organization for clearing.</p>

²⁰ Specifically, the Inter-Affiliate Swap No-Action Letter provides relief with respect to the following provisions: 17 C.F.R. §§ 45.3(d)(1) (swap creation data – primary economic terms), 45.3(d)(3) (swap creation data – confirmation data), 45.4(c)(1)(ii) (swap continuation data – life cycle event data/state data), 45.4(c)(2)(ii) (swap continuation data – valuation data), 45.5 (unique swap identifier), and 50.50(b) (in connection with election of the end-user exception to clearing). See Inter-Affiliate Swap No-Action Letter, at 6.

²¹ Inter-Affiliate Swap No-Action Letter, at 7.

²² Inter-Affiliate Swap No-Action Letter, at 7-8, n. 24.

²³ Inter-Affiliate Swap No-Action Letter, at 6-7.

(5) The parties have not elected to exempt the swap from a clearing requirement pursuant to the “Inter-Affiliate Clearing Exemption,” in which case applicable reporting requirements shall apply. ²⁴
(6) All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR pursuant to, or as if pursuant to, Parts 43, 45, and 46 of the CFTC regulations. ²⁵ (The CFTC notes that if the unaffiliated counterparty is the reporting party for any such swap, the affiliated counterparty may rely on the unaffiliated counterparty to report.)
(7) A reporting counterparty relying on this relief must maintain records of all swap data it would have been required to report if not for the no-action relief under the Inter-Affiliate Swap No-Action Letter. In addition, the reporting counterparty must maintain, as part of such records, internally generated swap identifiers for each swap subject to the relief. Promptly upon request from the CFTC, the reporting counterparty must make all such records available in reportable form for inspection and production.
(8) The swap is not required to be reported pursuant to the CFTC’s Part 43 real-time reporting rules. ²⁶
(9) The reporting counterparty relying on this relief complies with the requirement to report all swap data to an SDR no later than 30 days following the end of each fiscal quarter.

Reporting Obligations with Respect to Historical Swaps

The Inter-Affiliate Swap No-Action Letter exempts a reporting counterparty that is not a swap dealer or major swap participant, and is not an affiliate of a swap dealer or major swap participant, from requirements under Sections 46.3(a) and 46.3(b) of the Swap Reporting Rules²⁷ to report transaction data for historical swaps that meet the criteria described below:

Criteria for Dodd-Frank swaps to qualify for the no-action relief from historical swap reporting rules²⁸
(1) The reporting counterparty must satisfy conditions 1-4 described above for either the exemption for swaps between 100% owned affiliates or the quarterly reporting relief for swaps between majority-owned affiliates.
(2) The reporting counterparty relying on this relief must maintain records of all historical swap data as required by Part 46 of the Swap Reporting Rules, and must make such records

²⁴ See *supra* notes 17 and 18.

²⁵ 17 C.F.R. Parts 43, 45, and 46.

²⁶ See 17 C.F.R. Part 43.

²⁷ 17 C.F.R. §§ 46.3(a)-(b).

²⁸ Inter-Affiliate Swap No-Action Letter, at 8.

available to the CFTC for inspection and production promptly upon request, in a reportable form pursuant to Sec. 46.2 of the Swap Reporting Rules,²⁹ or any other form as may be requested by the CFTC.³⁰

CONCLUSION

Although the two CFTC no-action letters provide relief for many derivatives end-users from Dodd-Frank swap reporting requirements, market participants should note that Dodd-Frank swap recordkeeping requirements continue to apply, and that the compliance date of April 10, 2013, applicable to most end-users has now passed. Market participants, therefore, should ensure they are in compliance with applicable recordkeeping rules, in addition to any conditions required to take advantage of the no-action relief with respect to the Dodd-Frank swap reporting rules.

For more information about any of the foregoing, please contact the following members of the Firm's Derivatives Group: Joyce Xu (jxu@stblaw.com) and Brian Chernoff (bchernoff@stblaw.com).

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²⁹ 17 C.F.R. § 46.2.

³⁰ Inter-Affiliate Swap No-Action Letter, at 8.

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